APPEAL NO. 051248
FILED JULY 21, 2005

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 21, 2005, with the record closing on April 28, 2005. The two disputed issues were whether the appellant (claimant) sustained a compensable injury on _____, and whether the claimant had disability. The hearing officer resolved the disputed issues by deciding that the claimant did not sustain a compensable injury on _____, and that the clamant has not had disability. The claimant appealed the determinations on both disputed issues. The respondent (carrier) requests affirmance.

DECISION

Reversed and rendered.

COMPENSABLE INJURY ISSUE

The employer is a roofing company and has its office/shop location in (City 1), Texas, which is in the southern portion of (City 2), Texas. Beginning in May or June 2004, the employer began working on a large roofing job in (City 3), Texas, which is north of City 2. There were approximately 20 employees performing the job in City 3. Four or five of the employees lived in City 3 and did not get paid for travel time. Seven of the employees, including the claimant, lived in the same area in the northern part of City 2. Most, but not all, of those seven employees were related. The rest of the employees lived in the southern part of City 2. The employees who lived in City 2, including the claimant, were paid one hour for travel time to the City 3 job and one hour of travel time from that job, in addition to the hours worked at that job. The claimant began working for the employer in August 2004. One employee, who was second in charge after the foreman, and who lived in the northern part of City 2, was paid by the employer for gas and vehicle maintenance to use his private truck to transport himself and the other six employees in the northern part of City 2 to the City 3 job and back again to City 2. The employee/driver would pick up the employees living in the northern part of City 2 at their homes in the morning and take them to the City 3 job and then would transport them back to their homes in the afternoon. It was an approximately one hour drive from the north side of City 2 to the job in City 3. The employees living in the southern part of City 2 would drive their own vehicles to the employer's office/shop in the morning and they would then go to the City 3 job in two employer trucks, one driven by the foreman and the other driven by the owner's son. These employees would then be transported back to the office/shop in the two company trucks in the afternoon. The drive time from the office/shop to the City 3 job was approximately one and one-half hours to two hours.

On _____, the six employees living in the northern part of City 2, including the claimant, were picked up at their homes in the morning by the employee/driver in his

truck and were transported to the City 3 job. The work at the City 3 job stopped at 3:30 p.m., or shortly thereafter, and the six employees living in the northern part of City 2, including the claimant, began their trip back to City 2 in the employee/driver's truck with the employee/driver driving. They stopped for gas and sodas and then proceeded on their way to City 2. At 4:29 p.m., on a highway to City 2, the truck with these employees in it was involved in a motor vehicle accident (MVA). Five of the employees, including the employee/driver, died, and two employees, including the claimant, were injured in the MVA.

Fire extinguishers are required to be on hand at the roofing job. The foreman testified that on the afternoon of _____, after the employees were in the employee/driver's truck, he had instructed the employee/driver to go to the office/shop and pick up fire extinguishers for the job in City 3. The claimant said that he heard the foreman tell the employee/driver to pick up the fire extinguishers. Thus, there was a question as to whether the employee/driver and the six employees he was transporting were on the way to the office/shop to get the fire extinguishers when the MVA occurred. As far as we can discern from the record, the highway on which the MVA occurred is a route that would be used to drive the employees home and is also a route that would be used to go to the office/shop. A claims specialist for the carrier testified that when he interviewed the foreman and the owner of the employer a week after the MVA, there was no mention of the employee/driver being told to pick up fire extinguishers, and that the foreman had said at that time that the employees involved in the MVA were on their way home when the MVA occurred. There was also evidence that it would make no sense for the employee/driver to go all the way to the office/shop in the southern part of City 2 to pick up fire extinguishers in order to bring the fire extinguishers to the City 3 job the next day, because there were other employees who would be leaving from the office/shop the next morning to go to the City 3 job and they could easily bring the fire extinguishers with them. The hearing officer did not find the testimony regarding picking up the fire extinguishers to be credible and wrote in his decision that the claimant and the other employees in the truck involved in the MVA were on their way home from work. We conclude that the hearing officer's determination that the claimant and the other employees in the truck involved in the MVA were on their way home from work is supported by sufficient evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust.

Section 401.011(12) provides as follows:

> (12) "Course and scope of employment" means an activity of any kind or character that has to do with and originates in the work, business, trade, or profession of the employer and that is performed by an employee while engaged in or about the furtherance of the affairs or business of the employer. The term includes an activity conducted on the premises of the employer or at other locations. The term does not include:
>
> (A) transportation to and from the place of employment unless:

(i) the transportation is furnished as a part of the contract of employment or is paid for by the employer;

(ii) the means of the transportation are under the control of the employer; or

(iii) the employee is directed in the employee's employment to proceed from one place to another place; or

(B) travel by the employee in the furtherance of the affairs or business of the employer if the travel is also in furtherance of personal or private affairs of the employee unless:

(i) the travel to the place of occurrence of the injury would have been made even had there been no personal or private affairs of the employee to be furthered by the travel; and

(ii) the travel would not have been made had there been no affairs or business of the employer to be furthered by the travel.

The general rule is that an injury occurring in the use of the public streets or highways in going to and returning from the place of employment is noncompensable. American General Insurance v. Coleman, 157 Tex. 377, 303 S.W.2d 370 (1957). The rule is known as the "coming and going" rule. The rationale of the rule is that "in most instances such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risks and hazards having to do with and originating in the work or business of the employer." Texas General Indemnity Co. v. Bottom, 365 S.W.2d 350 (Tex. 1963). In order for the exceptions to the "coming and going" rule to apply, the claimant must not only show that a specific exception applies, but must show that the injury is of a kind or character that had to do with and originated in the work, business, trade or profession of his employer and was received while he was engaged in or about the furtherance of the affairs or business of his employer. Bottom, *supra*.

In Rose v. Odiorne, 795 S.W.2d 210 (Tex. App. 1990, no writ), the court stated:

> However, the employer's gratuitous furnishing or paying transportation as an accommodation to the worker and not as an integral part of the employment contract (i.e., that the employer need not furnish transportation in order to secure workers) does not by itself render compensable an injury occurring during such transportation. *Bottom*, 356 S.W.2d at 353; *Eberstein*, 711 S.W.2d at 357. The employee still must prove he was acting in the course of his employment at the time.

In St. Paul Mercury Ins. Co. v. Dorman, 341 S.W.2d 480 (Tex. Civ. App.- 1960, writ ref'd n.r.e.), the court stated:

> We think the question as to whether coverage to employees while going to and from their place of employment is recoverable depends upon the facts of each case. It seems clear that under the Texas statute, injuries are compensable which result from risks inherent in, or incident to, the conduct of the employer's business without regard to the time or place the accident occurred. It is generally accepted that the agreement of an employer to provide transportation for his employees need not be expressed but may be implied from the nature, conditions and circumstances of employment and the custom of the employer to provide transportation. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. An agreement to that effect may be either expressed or be shown by the course of business. In such case the hazard of the journey may properly be regarded as hazards of the service, hence, within the purview of the compensation act.

In the instant case, the hearing officer found that on _____, the claimant was not in the furtherance of the affairs of the employer when he was injured, in that there was no business purpose of the employer related to the claimant's travel; that reimbursement for gas expenses and the claimant's travel time at the time of the injury on _____, were a mere accommodation provided by the employer; and that on _____, the claimant was not injured in the course and scope of his employment, in that he was injured when he was traveling home from work.

We conclude that the hearing officer's findings are so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. The evidence reflects that the claimant's transportation to and from the City 3 jobsite was furnished by the employer and that the furnishing of the transportation was not a mere accommodation, but instead was an integral part of the employment contract. The testimony of the owner of the employer reflects that he made an agreement with the employee/driver for the employee/driver to use the employee/driver's personal truck to transport the employees to the City 3 job; that the employee/driver was reimbursed for gas used and maintenance of the truck; that the owner of the employer depended on the employee/driver, who was second in charge after the foreman, to use good judgment and to do what was best for the crew; that it was fine with the owner of the employer for the employee/driver to transport the employees to and from the job in City 3; and that while the employees could take their own vehicles to the job, the owner of the employer did not want the employees coming and going in 20 different vehicles, that

he wanted the employees to arrive at the jobsite at roughly the same time, and that he wanted them to travel together.

The evidence also reflects that the owner of the employer considered that the employees were in the course of their employment when they had the MVA. The evidence also reflects that the owner of the employer had an agreement with the employees living in City 2 to pay them each workday one hour of time for travel to the City 3 job and one hour of time for travel back to City 2, in addition to the hours paid for work at the City 3 job. While we recognize that there is evidence that the employee/driver wanted to use his own truck, the transportation was still provided by the employer due to the employer's payment of the gas and maintenance for the truck. We also recognize that by leaving for the City 3 job from their homes in the northern part of City 2 and by being transported back to their homes from the jobsite in City 3, the employees living in the northern part of City 2 would not have to travel to the southern part of City 2 to the employer's office/shop. However, it is clear that the employer, by having an arrangement with the employee/driver to transport the employees living in the northern part of City 2 to the City 3 jobsite and back, benefited from that arrangement, and furthered its affairs, as the employer was able to have those employees arrive at the jobsite at the same time, which the evidence reflects was usually earlier than the time the employees leaving from the office/shop would arrive at the jobsite. The foreman noted that generally it is important for the employees to start work early in order to complete jobs on time so that contract damages for not completing a job on time are not incurred by the employer.

We reverse the hearing officer's findings that the claimant was not in the furtherance of the affairs of the employer when he was injured, that the furnishing of gas expenses and the payment of travel time was a mere accommodation provided by the employer, and that the claimant was not injured in the course and scope of his employment, and we render a decision that the claimant was in the course and scope of his employment when he was involved in the MVA and that he sustained a compensable injury. We need not address the dual purpose doctrine in Section 401.011(12)(B) because the claimant comes within the exception to the going and coming rule in Section 401.011(12)(A)(i) and the furnishing of the transportation was an integral part of the employment contract, and not just a mere accommodation.

DISABILITY

The hearing officer found that if the injury of _____, were compensable, it would have caused the claimant's inability to obtain and retain employment at wages equivalent to the claimant's preinjury wage beginning on September 21, 2004, and ending on February 24, 2005, and at no other time. The hearing officer concluded that the claimant has not had disability based on his determination that the claimant did not sustain a compensable injury. Because we reverse the hearing officer's decision that the claimant did not sustain a compensable injury and render a decision that the claimant did sustain a compensable injury, we likewise reverse the hearing officer's determination that the claimant did not have disability, and we render a decision that the

claimant had disability beginning on September 21, 2004, and continuing through February 24, 2005. The claimant testified that he returned to work on February 25, 2005, making the same income as he had before his injury.

CONCLUSION

We reverse the hearing officer's decision that the claimant did not sustain a compensable injury and did not have disability, and we render a new decision that the claimant sustained a compensable injury on _____, and that the claimant had disability beginning on September 21, 2004, and continuing through February 24, 2005.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL R. OLIVER, PRESIDENT
221 WEST 6TH STREET, SUITE 300
AUSTIN, TEXAS 78701.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge